Filed 5/31/07 Danzas AEI Internat. v. Container Connection CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DANZAS AEI INTERCONTINENTAL et al., Plaintiffs and Respondents, v. CONTAINER CONNECTION OF SOUTHERN CALIFORNIA, INC. Defendant and Appellant.	B172120 (Los Angeles County Super. Ct. No. NC031519)

APPEAL from a judgment of the Superior Court of Los Angeles County, James L. Wright, Judge. Reversed in part; affirmed in part.

Wyatt Law Offices and Marva Jo Wyatt for Defendant and Appellant.

Flynn, Delich & Wise, Jeanine Steele Tede and Alex H. Cherin for Plaintiffs and Respondents.

INTRODUCTION

Defendant Container Connection of Southern California (CCSC) appeals from the judgment entered in favor of plaintiffs Danzas AEI Intercontinental (Danzas) and Danmar Lines, Ltd. (Danmar) (collectively referred to as plaintiffs). We reverse the judgment to the extent it is adverse to CCSC.

FACTS

Danzas is in the business of facilitating transportation services. Danzas acts as an agent for its sister company, Danmar, a non-vessel owning common carrier.[1] Danzas' duties include settling claims against Danmar.

In the fall of 2000, Danzas and Danmar formed a business relationship with Sensory Science (Sensory). Danzas, as agent for Danmar, arranged for the transportation and distribution of consumer electronic equipment belonging to Sensory from Korea to the United States. Toward this end, Danmar would issue a "through bill of lading"[2]

---

[1] A non-vessel owning common carrier (NVOCC) "is an intermediary between the shipper of goods and the operator of the vessel that will carry the goods. Generally, an NVOCC combines the goods of various shippers into a single shipment, contracts with a vessel for the transportation of the goods, and delivers the goods to the vessel, usually in a sealed container. [Citation.] NVOCCs perform a function similar to overland freight forwarders, consolidating small shipments from multiple shippers into large, standard-sized reusable containers that can be quickly loaded on and off ships and onto trucks or other types of transportation. [Citation.] [¶] As defined by statute, an NVOCC is a 'common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.' 46 U.S.C.App. § 1702(17). Conversely, an NVOCC is considered a carrier in its relationship with the shipper of the goods. [Citation.]" (*All Pacific Trading v. Vessel M/V Hanjin Yosu* (9th Cir. 1993) 7 F.3d 1427, 1429-1430.)

[2] A "through bill of lading" is one in which "cargo owners . . . contract for transportation across oceans and to inland destinations in a single transaction." (*Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.* (2004) 543 U.S. 14, 25-26.)

covering ocean carriage of Sensory cargo to the United States. When the cargo arrived in the United States, Danzas would see it through United States Customs.

Danzas in turn retained Gateway Transportation West (Gateway) to arrange drayage of the containers from the Port of Los Angeles to Gateway's warehouse. At its warehouse, Gateway unloaded the containers and palletized the cargo in accordance with Sensory's purchase orders. Danzas then made arrangements for motor carriage of the cargo from Gateway's warehouse to the ultimate consignees.

There was no written contract between Danzas and Gateway. Danzas, Sensory and Gateway jointly agreed on a set of standard operating procedures (SOPs) that were reduced to writing and distributed to the employees of each entity. Under the SOPs, Gateway was responsible for hiring motor carriers to dray the containers from the Port of Los Angeles to Gateway's warehouse. Danzas repeatedly instructed Gateway not to permit storage of Sensory cargoes in locations other than Gateway's warehouse. Gateway was not to pick up cargo it could not store in its warehouse.

Stolen Shipment

On December 4, 2000, Danmar issued a through bill of lading to a shipper for transportation of Sensory's dual deck VCRs from Seoul, Korea to the Port of Los Angeles and from the port to Gateway's warehouse located at 8320 Isis Avenue in Los Angeles. Gateway hired CCSC, a motor carrier licensed by the United States Department of Transportation, to pick up the cargo and transport it to Gateway's warehouse.

On December 11, 2000, Marilu Henderson (Henderson) at Danzas faxed a delivery order to Steve Tarlow (Tarlow) at Gateway. Henderson signed the order on behalf of Danzas as agent for Sensory. The order specified that 2,880 dual deck VCRs were being shipped in three containers, HLCU4283203, HLXU4153360 and HLXU4361678, with each container holding 960 VCRs. The order further listed CCSC as the company responsible for local delivery or transfer of the VCRs and to which the delivery order would be issued. Delivery was to be made to Gateway's warehouse.

On December 14, 2000, Gateway instructed CCSC to pull the three containers from the terminal and dray them to Gateway's warehouse. CCSC did as it was instructed, but Gateway refused to take delivery of container HLXU4361678.[3]

On the afternoon of December 14, CCSC's Vice President, Jim Horvitz (Horvitz), was working when one of his drivers notified him that Tarlow at Gateway was refusing to accept one of the containers Gateway had directed CCSC to pick up. Horvitz instructed the driver to stay at Gateway's warehouse and telephoned Tarlow. Tarlow told Horvitz there was no room for the container at the warehouse, CCSC would have to store the container over the weekend. Tarlow did not know when he would be able to accept delivery. Horvitz told Tarlow he would park the container outside in CCSC's yard, charge him for the storage, and send him a warehouse receipt to cover the storage. Tarlow agreed. Gateway had never before asked CCSC to store a container of Sensory goods overnight. Horvitz agreed to store the container in reliance on Tarlow's assurances that Tarlow was authorized to accept the warehouse receipt containing a limitation of liability. Horvitz would not have agreed to store the container overnight without an agreement limiting CCSC's liability.

Unbeknownst to CCSC, Gateway was not to pull a container from the Port of Los Angeles if it could not take it and unload it the same day. All containers were to be unloaded and the contents placed inside Gateway's facility. Gateway was not to store a container in its parking lot or to divert a container to a third party's yard.

When the container arrived at CCSC's facility in South Gate at 5:30 p.m., Horvitz prepared a warehouse receipt, which listed the storage rate as $15 per day, and faxed it to

---

[3] Gateway customarily faxed Danzas a copy of the CCSC delivery receipt once Gateway received the goods into its warehouse. This procedure ensured that the container had been received. On December 14, 2000, Tarlow faxed Henderson two CCSC delivery receipts. These receipts identified container numbers HLXU4153360 and HLCU4283203 and confirmed that CCSC had pulled these containers and delivered them to Gateway. A third delivery receipt referencing container number HLXU4361678 bore the notation "refused."

Tarlow. Horvitz then called Tarlow and confirmed that he had received the fax. When Horvitz inquired of Tarlow whether anyone else needed to receive a copy of the warehouse receipt, Tarlow said no. Tarlow later acknowledged that he never should have instructed CCSC to pull the container from the terminal.

Upon arrival at the CCSC facility, CCSC detached the tractor (chassis) from the trailer holding the container and parked both in CCSC's fenced container yard. The container was sealed. CCSC did not have authorization to break the seal, remove the contents of the container and place them inside the warehouse. The container was too large to fit inside CCSC's warehouse. CCSC had never before been asked to store a container full of electronic equipment and had no prior notice that it would be asked to do so. CCSC exercised the same degree of care for the container as it did for its own equipment and vehicles. CCSC did not know that Sensory's electronic products were "highly stolen cargo" and that Sensory merchandise previously had been stolen from Gateway's warehouse.[4]

CCSC's facility consisted of a 50,000 square foot lot. On the lot was a 10,000 square foot building, containing warehouses and offices. The building served as part of the property's boundary. A six to eight-foot-tall chain-link fence topped with razor wire bounded the remaining perimeter of the property. Trailers could not be stored in the building and thus were parked in the yard. While the number of containers parked in the yard varied, there typically were six to twenty containers parked in the yard each night.

CCSC's yard was closed to drivers from 8:00 p.m. to 5:00 a.m. unless other arrangements were made. During this time, the gate was closed and padlocked. CCSC's office was open and staffed from 6:00 a.m. to 6:00 p.m. Between 5:00 a.m. and 6:00 a.m. and between 6:00 p.m. and 8:00 p.m., when there was no office staff, the gate to the facility was closed. If a driver needed access to the yard during these hours, prior arrangements had to be made.

---

[4] In November 2000, due to a number of thefts of Sensory cargo, Danzas had implemented security measures at Gateway's warehouse.

In December 2000, CCSC had no professional security guards, security cameras or guard dogs. Although the building had an alarm system, the fence had no alarm. There were no motion detectors outside.

One of CCSC's drivers, an independent contractor named Douglas Hernandez (Hernandez), served as a watchman or security guard on the property. He was not a professionally trained or licensed security guard, however. He lived on the premises, along with his personal dogs. His only responsibilities were locking the gate each night and being present on the premises when there was no one in the office. He received $200 a week for these additional services. He was not required to patrol the premises or inspect containers stored on the property overnight.

Sometime during the night, the tractor, trailer and container containing Sensory's electronic goods were stolen from CCSC's yard. No prior thefts had occurred from CCSC's yard.[5]

Notice of Claims and Settlement Between Danzas and Sensory

On December 22, 2000, in response to the theft of the container, Sensory sent a notice of claim to Danzas for the loss in the amount of $383,040. On January 19, 2001, Danzas issued its own notice of claim to Gateway. The notice referenced the stolen container and stated that "[c]laim in the amount of One Hundred Dollars (USD 100.00) more or less is made against you."

On February 1, 2001, Ron McCann, Danzas' corporate claims manager, sent Gateway correspondence stating: "Formal claim has been received from the cargo owner Sensory Science Corp., in the amount USD 383,040.00 covering the loss of the captioned shipment. Inasmuch as this shipment was tendered to Gateway Transportation, we must hold you responsible and that of your sub-contractor for this loss. [¶] We request that this formal claim against Gateway Transportation be referred to your insurance company

---

[5] Additional facts will be incorporated into the legal discussion where relevant.

and that of Container Connection. [¶] It is trusted that this matter can be resolved without the necessity of involving legal counsel, but the failure of your insurance company and that of Container Connection's to promptly acknowledge [receipt] of this formal claim, will result with 'our' prompt referral to counsel to protect our legal interest." Gateway's correspondence noted that a copy had been sent to CCSC. Danzas received no response from either Gateway or CCSC.[6]

Plaintiffs sought legal opinions regarding their potential liability. In an opinion letter dated February 13, 2001 and addressed to Carl J. Werra at Thomas Miller (Americas) Inc., Attorney Peter J. Zambito opined that Danmar's liability was limited to $2.00 per kilo of gross weight. Given a weight of 8,640 kilos, Danmar's potential liability was computed to be $17,280.[7]

---

[6] On the Monday following the theft of the container, Horvitz notified CCSC's insurance agent of theft. The agent, in turn, notified CCSC's insurance provider, Safeco. About three weeks after the theft, Safeco cancelled CCSC's insurance policy. Horvitz remembered receiving Danzas' claim for money around March 2001. CCSC's insurance already had been cancelled when the claim was received. Horvitz forwarded the claim to Safeco.

On April 23, 2001, Safeco sent CCSC a check for $100,000. The check references a loss date of December 14, 2000 and states it is made in payment of CCSC's policy limits. Horvitz deposited the check into CCSC's business account.

According to Wendy Winslow-Nason, the custodian of records maintained by Safeco in connection with "Claim 61E003503255" submitted by CCSC, the claims file contains a number of letters addressing a "dispute over the extent and nature of [CCSC's] insurance coverage." With respect to the $100,000 check, Ms. Winslow-Nason stated: "There are no documents maintained by Safeco in connection with Claim 61E003503255 which discuss the disposition of the $100,000. There are no documents which instruct CCSC to pay the $100,000 to Danzas. There are no documents which state that the tender of the $100,000 in policy limits was for the benefit of Danzas." She further stated that "Safeco is presently providing a defense to Danzas' claim against CCSC, under a reservation of rights, and in providing that defense I understand there is a significant dispute over whether Danzas is entitled to recover any money from CCSC in excess of the $50 released value which I understand forms a part of the contract between Danzas and its customer."

[7] In rendering this opinion, Attorney Zambito relied upon clause 14.2A of Danmar's bill of lading. It provides:

In a letter dated February 26, 2001, Attorney Charles Jordan concluded that the limitation clauses in the Danmar bill of lading are "at best ambiguous." He further explained: "Although we believe that this claim presents a close call, it is our opinion that a court, charged with interpreting the bill of lading, would most likely conclude that there is no limitation amount applicable to this loss. In the alternative, the court will adopt the reasoning contained in Mr. Werra's opinion letter of February 13th and conclude that the loss is limited to $2 per kilo."

"Where the stage of Carriage where the loss or damage occurred can be proved, the liability of the Carrier shall be determined by the provisions contained in any international convention or national law of the country which provisions

"a) cannot be departed from by private contract to the detriment of the Merchant, and

"b) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of carriage where the loss or damage occurred and had received as evidence thereof any particular document which must be issued in order to make such international convention or national law applicable.

"With respect to the transportation in the United States . . . to the Port of Loading or from the Port of Discharge, the responsibility of the Carrier shall be to procure transportation by carriers (one or more) and such transportation shall be subject to the inland carrier's contracts of carriage and tariffs and any law compulsorily applicable as well as subject to any liability limitations contained in said inland carrier's contracts. The Carrier guarantees the fulfillment of such inland carrier's obligations under their contracts and tariffs and the terms and conditions contained in those contracts and tariffs shall be incorporated into this Bill of Lading. If there is no such international convention or national legislation applicable . . . the liability of the carrier shall be determined in accordance with the provisions of Clause 14.2 B) below."

Clause 14.2 B) provides: "Where the stage of Carriage where the loss or damage occurred cannot be proved, compensation shall not, however, exceed US$ 2.00 per kilo of gross weight of the goods lost or damaged provided that the Hague Rules or he Hague-Visby Rules or any legislation applying such Rules (such as COGSA or COGWA) is not compulsorily applicable."

Although counsel believed Clause 14.2 B) to be ambiguous, he viewed it "as limiting liability to $2.00 per kilo of the gross weight of the goods lost or damaged. The 960 sets weighted 8,640 kgs. At $2.00 per kg., the limitation, if applicable, would be $17,280."

Danzas concluded that it faced actual, potential or reasonably apparent liability for the theft, in that Danmar had issued the through bill of lading. Danzas therefore negotiated a settlement with Sensory. In accordance with that settlement, Danzas on March 1, 2001 sent Sensory a check for $203,440.09.[8] Danzas also gave Sensory credit for future freight bills. At no time during the negotiations did plaintiffs attempt to limit their liability in accordance with Danmar's bill of lading, the SOPs or the standard terms and conditions of service (STCs), which contained a $50 limit of liability per shipment.[9] Danzas did not give CCSC notice that it was settling with Sensory.

---

[8] This amount represented the value of the stolen cargo ($200,640) and the ocean freight for the cargo ($2,800.09).

[9] Section 4.1 of the SOPs pertaining to insurance coverage while the product is in transit provides: "DANZAS AEI Corporation will accept liability for fire and earthquake damage for the product and insure the products for the 'wholesale' price to your buyers, only during the time the product is in our warehouse at 8320 Isis Avenue, Los Angeles. Sensory Science accepts and agrees that at all other times during transport of goods under DANZAS AEI Corporation transport documents, DANZAS AEI Corporation liability for loss or damage is limited to our standard terms and conditions for limited legal liability. [¶] Should Sensory Science wish to purchase additional insurance coverage extra charges are applicable."

The STCs stated that "[a]ll shipments to or from the Customer, which term shall include the exporter, importer, sender, receiver, owner, consignor, consignee, transferor or transferee of the shipments, will be handled by the forward and/or customs broker (hereinafter called the 'Company') on the following terms and conditions: . . . [¶] . . . [¶]

"**1. Services by Third Parties.** Unless the Company carries, stores, or otherwise physically handles the shipment, and loss, damage, expense or delay occurs during such activity, the Company assumes no liability as a carrier and is not to be held responsible for any loss, damage, expense or delay to the goods to be forwarded or imported except as provided in paragraph 8 and subject to the limitations of paragraph 9 below, but undertakes only to use reasonable care in the selection of carriers, truckmen, lightermen, forwarders, customs brokers, agents, warehousemen and others to whom it may entrust the goods for transportation, carriage, handling and/or delivery and/or storage or otherwise. When the Company carries, stores or otherwise physically handles the shipment, it does so subject to the limitation of liability set forth in paragraph 8 below unless a separate bill of lading, air waybill or other contract of carriage is issued by the Company, in which event the terms therefore shall govern.

On March 14, 2001, Mr. Werra sent an email to Bryan Rettmann at Danzas stating, "We have decided that the limitations in the bill of lading must be recognized as valid and must be offered in settlement to the consignee." The email continued: "'So, in this situation, we recommend that we make every effort to demonstrate to the trucker that we have at least tried to settle the claim within the contractural [*sic*] liability limits.'" "'Neither you nor we want to jeopardize your rights by agreeing to settle the claim in full and ultimately being faced with the attorney for the trucker and/or his insurance company arguing that we should have limited liability under the bill of lading.'" Mr. Werra suggested that Danzas first offer the limitation of liability and then negotiate up from

---

"**2. Liability Limitations of Third Parties.** The Company is authorized to select and engage carriers, truckmen, lightermen, forwarders, customs brokers, agents, warehousemen and others, as required, to transport, store, deal with and deliver the goods, all of whom shall be considered as the agents of the Customer, and the goods may be entrusted to such agencies subject to all conditions as to limitation of liability for loss, damage, expense or delay and to all rules, regulations, requirements and conditions, whether printed, written or stamped, appearing in bills of lading, receipts or tariffs issued by such carriers, truckmen, lightermen, forwarders, customs brokers, agents, warehousemen and others. The Company shall under no circumstances be liable for any loss, damage, expense or delay to the goods for any reason whatsoever when said goods are in custody, possession or control of third parties selected by the Company to forward, enter and clear, transport or render other services with respect to such goods.

"[¶] . . . [¶]

"**8. Limitation of Liability for Loss, etc.** (a) The Customer agrees that the Company shall only be liable for any loss, damage, expense or delay to the goods resulting from the negligence or other fault of the Company; such liability shall be limited to an amount equal to the lesser of fifty dollars ($50.00) per entry or shipment or the fee(s) charged for the services, provided that, in the case of partial loss, such amount will be adjusted *pro rata*; [¶] (b) Where the Company issues its own bill of lading and receives freight charges as its compensation, Customer has the option of paying a special compensation and increasing the limit of Company's liability up to the shipment's actual value; however, such option must be exercised by written agreement, entered into prior to any covered transaction(s), setting forth the limit of the Company's liability and the compensation received; [¶] (c) In instances other than in (b) above, unless the Customer makes specific written arrangements with the Company to pay special compensation and declare a higher value and Company agrees in writing, liability is limited to the amount set forth in (a) above; . . ."

there. By the time Rettmann received this email, the settlement check already had been sent.

PROCEDURAL BACKGROUND

On January 31, 2002, Danzas and Danmar filed an action against CCSC and Gateway, alleging six causes of action for loss of cargo, breach of contract, negligence, breach of duty to care for property in bailment, conversion and equitable indemnity and contribution. Danzas and Danmar sought damages in the amount of $203,440.09, prejudgment interest and costs.

On April 15, 2002, CCSC filed its answer to Danzas and Danmar's complaint, as well as a cross-complaint against Gateway and other entities who are not parties to this appeal, alleging causes of action for breach of contract/indemnity, negligence, contribution, conversion and declaratory relief.

On October 21, 2002, Gateway filed its answer to Danzas and Danmar's complaint and its answer to CCSC's cross-complaint. Gateway, along with others, also filed a cross-complaint against CCSC which included causes of action for breach of contract, indemnity, negligence, contribution, conversion, defamation and declaratory relief. On October 28, CCSC filed a first amended cross-complaint, which added a cause of action for open account.

On February 14, 2003, plaintiffs filed a motion for summary adjudication of their sixth cause of action for equitable indemnity and contribution. On June 4, 2003, CCSC filed a motion for summary judgment, claiming that its liability to plaintiffs was limited pursuant to the terms of the CCSC warehouse receipt to $96.40. Alternatively, CCSC sought summary judgment on the ground that Danzas was not entitled to recover more than $50.00 for the lost shipment, in that Danzas' own liability to Sensory Science was limited to that amount by its STCs, which were listed on delivery orders and invoices sent to Sensory Science prior to the loss.

On June 6, CCSC filed a motion for summary adjudication of each of the six causes of action set forth in plaintiffs' complaint. Also on June 6, plaintiffs filed two motions for summary adjudication. One was directed against Gateway. The other was directed against CCSC. In these motions, plaintiffs claimed an entitlement to judgment in their favor against Gateway and CCSC on their sixth cause of action for equitable indemnity and contribution. Gateway filed no opposition.

On August 21, 2003, the trial court announced that its tentative decision was to deny plaintiffs' motion for summary adjudication of their sixth cause of action for equitable indemnity and contribution. While the court believed plaintiffs were entitled to equitable indemnity, the amount to be recovered remained to be resolved. With respect to CCSC's motion for summary adjudication, the court stated that its tentative decision was to grant the motion with respect to plaintiffs' first, second and fifth causes of action for loss of cargo, breach of contract and conversion, respectively, denying the motion as to the remaining third, fourth and sixth causes of action for negligence, breach of duty to care for property in bailment and equitable indemnity, respectively. The court also noted it was inclined to deny CCSC's motion for summary judgment on the ground that material factual issues remained unresolved, including "the existence of a contract, the issues of delivery, the issues of the contractual nature, if any, of the standard operating procedure," "[t]he issue of the reasonableness of the settlement," and issues pertaining to the warehouse receipt. At the conclusion of the hearing, the trial court took the matter under submission.

At the next hearing held on August 25, 2003, plaintiffs' counsel advised the court that it had conferred with counsel for CCSC and "reached an agreement in principle as to how to conduct the trial if the court [was] inclined to look at the evidence submitted as an issue of fact." Specifically, counsel agreed that "all the moving papers, oppositions and replies submitted be turned into trial briefs; that the parties be permitted to submit supplemental trial briefs introducing any evidence and/or testimony that was not included in those papers, have the judge or the court review that; and then we come back for argument and submit it on that basis." Counsel further stipulated to the authenticity of

various documents lodged with the court. This included documents attached to the depositions, with the exception of the police report which was the subject of a motion in limine filed by CCSC. The court continued the hearing on the motion for summary judgment to September 22, 2003. The court directed counsel to file supplemental trial briefs by September 9, 2003 and stated that it would rule on motions in limine within five days. There is no minute order reflecting a ruling on the motions in limine, however.

On September 22, 2003, the court entertained the arguments of counsel. When counsel for CCSC broached the subject of the police report that CCSC challenged in its motion in limine, the court said, "It's hearsay." With regard to the officer's written conclusions contained in the police that the theft "'was an inside job,'" and "things of that nature," the court noted, "those are strictly conclusions" and "I don't think that's something that this court is bound as to relevance." At the conclusion of the hearing, the court took the matter under submission.

On September 30, 2003, the trial court issued a statement of decision and signed a judgment in favor of Danzas and Danmar against CCSC in the amount of $91,548.45 plus interest and costs and against Gateway[10] in the amount of $91,548.45 plus interest and costs.[11] In its statement of decision, the court found that CCSC's liability was not limited under the warehouse receipt it issued on December 14, 2000. The court further found that Danzas and Danmar acted reasonably in effecting settlement of Sensory's claim in the amount of $203,440.09, that Gateway was negligent in failing to comply with the terms of the SOPs established between Gateway, Danzas and Sensory and in failing to maintain the cargo in a secure facility.

With regard to the apportionment of liability, the court made the following findings: "Danzas' negligence, if any, must be premised on a failure to exercise diligence

---

[10] The trial court granted plaintiffs' motion for summary adjudication as to Gateway. It also entered judgment against CCSC on its cross-complaint against cross-defendant entities that are not parties to this appeal.

[11] Gateway did not appeal from the judgment.

in monitoring the conduct of its agent, Gateway. The SOP required strict time limits for determining the specific location of shipments of Sensory . . . . Those time limits were not enforced by Danzas on December 14th. I find the failure to monitor to be a factor of 10% of the cause of loss.

"Gateway's negligence is based on two factors: Its failure to conform to the requirements imposed on it by the SOP, and its action in directing overnight storage of the container to CCSC, in violation of the SOP. I find Gateway's negligence to be a factor of 45% of the cause of loss.

"CCSC was negligent in that it failed to safeguard and monitor the container with which it had been entrusted. I find CCSC's negligence to be a factor of 45% of the cause of loss."

On October 14, 2003, plaintiffs filed a motion to clarify and amend the judgment. Specifically, plaintiffs asked the court to amend the judgment to reflect CCSC's correct name and to specify that Gateway and CCSC were jointly and severally liable.

On November 25, 2003, the court ordered the statement of decision amended "to reflect that prejudgment interest shall accrue from the date of filing of the complaint by plaintiff[s]." The court further ruled on a motion to tax costs and denied CCSC's motion to reduce the rate of interest and plaintiffs' motion to declare the liability of Gateway and CCSC to be joint and several. The court determined that their liability "should be based on equitable indemnity and comparative negligence."

The following day, November 26, 2003, CCSC filed its notice of appeal from the September 30, 2003 judgment. On December 19, 2003, an amended judgment specifying the amount of interest and costs and correcting CCSC's name was entered.

CONTENTIONS

CCSC contends (1) that a voluntary payment without regard to legal liability is not recoverable from a third party; (2) there is no competent evidence that CCSC was notified of the impending settlement between Danzas and Sensory; (3) the trial court

erred in applying the law of motor carriers instead of the statutory provisions applicable to warehousemen; (4) CCSC's warehouse receipt was accepted by Danzas' agent and limits CCSC's liability as a matter of law, and CCSC's warehouse receipt offered a fair opportunity to increase CCSC's liability and circumscribed the duties owed by CCSC.

Because we agree with CCSC's further contention that it was not negligent, we reverse the judgment. In light of this holding, we need not and do not reach the merits of the other issues raised by CCSC.

DISCUSSION

There are two forms of equitable indemnity: tort-based indemnity and implied contractual indemnity. Each form of indemnity arises from a different source. Tort-based indemnity stems from a duty of due care to an injured party and usually involves a breach of that duty. This form of equitable indemnity only applies when the indemnitor and indemnitee are jointly and severally liable to an injured third party. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 116; *Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 751.) Implied contractual indemnity, however, is premised upon the indemnitor's breach of duty owed to the indemnitee to perform its contractual duties properly. (*Bear Creek Planning Com. v. Title Ins. & Trust Co.* (1985) 164 Cal.App.3d 1227, 1238-1239, disapproved on other grounds in *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1031-1032.) This latter form of indemnity is not a claim for contribution from a joint tortfeasor. (*Bear Creek Planning Com., supra,* at pp. 1238-1239.)

In this case, the trial court determined that CCSC was *negligent* for failing to safeguard and monitor the container with which it had been entrusted, that Danzas was responsible for 10 percent of Sensory's loss and that Gateway and CCSC each was responsible for 45 percent of Sensory's damages. CCSC challenges the sufficiency of the evidence to support the court's finding that it was negligent, asserting that the trial court "disregarded the *circumstances* under which CCSC was burdened" and "merely relied

upon the *fact of the theft* to conclude CCSC was legally liable." We agree that the evidence is insufficient.

When the trial court's factual determination has been challenged on appeal, the scope of appellate review is limited to a finding of whether substantial evidence exists which will support the trial court's conclusion. (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1229.) Substantial evidence is evidence of ponderable legal significance. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.) The trial court's findings of fact will be reversed on appeal only if they are unsupported by substantial evidence. (*Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1289.)

On appeal, this court views the entire record to determine if there is substantial evidence, contradicted or uncontradicted, which supports the findings. (*Bowers v. Bernards*, *supra*, 150 Cal.App.3d at pp. 873-874.) The trial court, as trier of fact, has the duty to weigh and interpret the evidence and draw inferences therefrom. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 598.) This court cannot reweigh the evidence or draw contrary inferences. (*Ibid*.) Thus, it must resolve all conflicts in the evidence and draw all reasonable inferences in favor of the findings. (*Watson v. Department of Rehabilitation*, *supra*, 212 Cal.App.3d at p. 1289.) Evidence accepted by the trial court as true may not be rejected by the appellate court unless it is physically impossible or its falsity is obvious without resort to inference or deduction. (*Id.* at p. 1293.)

At the direction of Gateway, CCSC picked up container number HLXU4361678 from the Port of Los Angeles and drayed it to Gateway's warehouse. Gateway refused to accept the container thereby placing CCSC in an untenable position. When Gateway asked CCSC to store the container at its own yard, given the time of day, CCSC really had no choice but to agree in the face of Gateway's refusal to accept the container. CCSC could not just abandon the container at Gateway's facility. Upon arrival at its yard at 5:30 p.m., CCSC's driver detached the tractor from the trailer and parked both in its yard. In addition, Horvitz faxed a warehouse receipt to Tarlow and, in an effort to notify

all pertinent parties, inquired if the receipt should be faxed to anyone else. Tarlow said no.

Around 7:00 a.m. on December 15, 2000, South Gate Police Officer Luis Garcia drove to CCSC's yard in response to a grand theft auto report. There, he learned that a tractor, as well as a container, had been stolen. The officer observed tractors and trailers spread throughout CCSC's yard.

Officer Garcia spoke to Hernandez, who confirmed that he had locked the gate the previous night, using a chain and padlock.[12] Hernandez, who slept on the property and performed very limited duties as a watchman, did not hear the trailer and tractor being stolen or his dogs bark. Officer Garcia observed no signs of forced entry into the yard, tractor or container. He further observed that the chain and padlock Hernandez used to lock the gate the previous night were missing.

There is no question that CCSC had a duty of care with respect to the container. In our view, however, there is no evidence that CCSC was negligent. Its status as a motor carrier or a warehouse, therefore, is inconsequential. CCSC was unaware that Sensory's products were "'a highly stolen cargo.'" Horvitz had never before suffered a theft from CCSC's yard. Thus, the absence of security cameras, a bona fide security guard, guard dogs and motion detectors is insufficient to establish a breach of the duty of due care. Hernandez fulfilled his responsibility of locking the gate on the night prior to the theft. That Hernandez, who went to sleep late, was not awakened by the sound of the trailer and tractor being stolen or the barking of his dogs does not establish that CCSC was negligent. There is no evidentiary basis supporting the trial court's finding that CCSC was negligent and, consequently, there is no basis for equitable indemnity in this

---

[12] The trial court incorrectly noted that "[t]here has been no evidence received as to whether the gate was actually locked overnight." At his deposition, Officer Garcia testified that Hernandez told him he had actually locked the gate the night before the theft of the trailer and container. In any event, the burden would have been on plaintiffs to present evidence that the gate had not been locked. They failed to provide such evidence.

case. Sensory's loss was attributable to unidentified criminals, not the negligence of CCSC.

The judgment in favor of plaintiffs and against CCSC is reversed. In all other respects, the judgment is affirmed. CCSC is awarded its costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.*

We concur:

MALLANO, Acting P. J.

ROTHSCHILD, J.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.